Department of Law Monthly Report

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Collections & Support

2002 PFD ATTACHMENT SUBMITTED

The collections unit has submitted the 2002 Permanent Fund Dividend attachment to the Department of Revenue. We matched on almost 35,500 judgments with a total value of over $11 million. Based on prior year collection rates we expect to receive approximately $3.3 million from the 2002 PFD.

The collections unit welcomed Mindy Ziolkowski to the section as the new Administrative Clerk III. She will be assisting with victim restitution collections.

VICTIM RESTITUTION UPDATE

The unit opened 67 criminal and 7 juvenile restitution cases for collection. We returned 9 criminal judgments to the issuing courts due to insufficient information. Initial notices were sent to 129 recipients. Five judgments were paid in full, and satisfactions of judgment were filed. Our office received payments totaling $25,031.36 toward criminal restitution judgments and payments totaling $8,347.32 toward juvenile restitution judgments in August. We requested 108 disbursement checks, and

issued 94 checks to recipients. Ten payment agreements were established during this time.

BIOLOGICAL FATHER ORDERED TO PAY SUPPORT AFTER ADOPTION VACATED

Judge Bolger determined that a biological father should again be required to support two adopted children after the adoption was vacated. This case came to CSED's attention when the mother requested a child support order against the biological father.

After the biological parents divorced, the mother married another man who adopted her two daughters. When this second marriage ended in divorce, the divorce orders included a provision that the adoption was vacated and that the biological father would again be considered the children's father. AAG Jeff Killip asserted that CSED could not take a position on the mother's request for a child support order against the biological father until the court addressed whether the original adoption was valid, whether the order vacating the adoption was effective, whether the biological father had been afforded due process in the second divorce, and whether the adoptive father needed to be included in the child support proceedings.

Judge Bolger found that there was no reason to believe the adoption was not valid. He further found that, although the biological father could have been given better notice of the proceeding to vacate the adoption, the biological father had actual notice of the proceeding, he knew that his child support obligations would be reinstated, and he was excited about having a second chance at being the father. Judge Bolger therefore granted the mother's request for an order of support against the biological father.

COURT ALLOWS PROSPECTIVE RELIEF FOLLOWING DISESTABLISHMENT

In *Torrey v. State*, AAG Richard Sullivan successfully defended CSED against a claim for reimbursement of support collected from a man who was determined not to be the child's biological father. Torrey and the mother were married in 1992. A minor child was born in 1993. The parties were separated on and off over the years, during which time CSED collected over $12,000 in child support. Of this amount, $10,000 was disbursed to the mother and the remainder was retained by the state as public assistance reimbursement. The parties divorced in 2001, about the same time the mother told Torrey he was not the father. Genetic tests confirmed that Torrey was not the father. Paternity was disestablished in February 2002.

Torrey then filed a motion requesting reimbursement of all funds (including amounts disbursed to the mother) he had paid to CSED. Torrey argued that a refund was required by AS 25.27.166 or Civil Rule 60(b)(6). CSED opposed the motion, arguing that Torrey was entitled to prospective relief only under Rule 60(b)(5). The court agreed with CSED and denied Torrey's request. The court found that AS 25.27.166 clearly did not apply. In addition, the court found that CSED had acted reasonably, thus distinguishing *Atcherian v. State*, 14 P.3d 970 (Alaska 2000). Therefore, the court held that Torrey was entitled only to prospective relief and not to a refund of funds previously collected.

Commercial Section

STUDENT LOAN CASE SETTLED

AAG Mary Ellen Beardsley represented the Alaska Commission on Postsecondary Education (ACPE) in a Chapter 7 bankruptcy in which the debtor attempted to discharge in excess of $175,000 in student loans. Sallete Benavidez had obtained the loans from ACPE and a federal lender and was seeking an undue hardship discharge. ACPE is owed $56,000 of the amount. The case settled shortly before

trial. The debtor agreed to pay ACPE $125 per month for 25 years and assign her PFDs for 25 years. After the 25 years has expired ACPE will write off any remaining balance still due and owing on her loans. ACPE will receive approximately $70,000 under this arrangement. The debtor will repay her federal loans under the William D. Ford program which bases payments on income and spreads the payments out for 25 years.

GAMING CASE SETTLED FOR $400,000

Attorney General Botelho brought suit in 1999, to require two professional gaming operators (Mark and Sue Griffin) to give back the money they received through violations of the state's charitable gaming laws. Any money received would be paid to the charities for whom the defendants conducted gaming. However, if those charities opted out of the case, the funds would be paid to a charity chosen by the attorney general. Most of the charities did opt out of the case during its early stages. The superior court ruled that without the charities consent, the attorney general could not pursue his claim for money damages. The state successfully petitioned for review of this ruling to the Alaska Supreme Court, which reversed the superior court ruling and the matter was set for trial.

Settlement was reached in August, just months before trial. Pursuant to the agreement, the defendants delivered $400,000 in cash, which will be paid out to charity at the direction of the attorney general. The defendants may not seek reimbursement of this payment from the charities. AAGs Randy Olsen and Dan Branch represented the state in the case.

Fair Business Practices

DISCIPLINARY ACTION TAKEN AGAINST TWO PHYSICIANS

On August 19-23, 2002, a disciplinary hearing was held on an Anchorage osteopathic physician. The Division of Occupational Licensing is seeking to have restrictions placed on his license based on evidence presented at the hearing that the doctor suffers from bipolar disorder and experiences periodic episodes of depression which impairs his ability to practice medicine safely. The hearing officer previously rejected the doctor's argument that the Americans With Disabilities Act precluded any discipline based on mental illness. A decision from the hearing officer is expected in the next few months. AAG Robert Auth represented the Division at the hearing.

On August 28, 2002, the State Medical Board summarily suspended the license of another Anchorage osteopathic physician, based on a finding that the doctor poses a clear and immediate danger to the public health and safety if he practices as a physician. AS 08.64.331(c). The Division of Occupational Licensing's petition included affidavits and expert reports demonstrating that the doctor failed to sufficiently evaluate patients to allow the prescribing of controlled substances, failed to perform additional evaluations when patients reported new problems or symptoms, failed to alter his prescribing practices even when patients were clearly overusing or abusing medications, and failed to monitor his patients when providing intramuscular injections in his office. A further basis for the petition was that the doctor was recently indicted on multiple counts of health care fraud. A hearing on the suspension is scheduled for September. AAG's Robert Auth and Roger Rom are representing the Division in this matter.

RCA ISSUES ORDER IN ENSTAR RATE CASE

A rate case involving Enstar went to hearing before the Regulatory Commission of Alaska (RCA) in December 2001. The issue before the RCA was to establish Enstar's proper revenue requirement, which is used to set the rates that Enstar can charge its utility customers as a regulated monopoly provider of natural gas in Southcentral.

This was Enstar's first rate case in over 15 years. Because of the lack of any recent regulatory rate review, Enstar was ordered to come in for a rate case by the RCA.

In its filing, Enstar said its current rates were just and reasonable, and it required no change in its revenue requirement. The PAS, represented by AAG DeVries, disagreed, arguing that Enstar's operating expenses and rate base were unreasonably inflated.

In its order, the RCA agreed with virtually every argument raised by the PAS, and concluded that Enstar's revenue requirement was excessive. Customer base rates will be reduced approximately 4% across the board pending a rate design hearing to be held next summer.

Governmental Affairs

PUBLIC EMPLOYEES' RETIREMENT BOARD REVERSES POSITION, RULES THAT PUBLIC EMPLOYEES' RETIREMENT SYSTEM MEMBERS CANNOT INFLATE PENSIONS BY CASHING IN LEAVE DURING FINAL YEARS OF EMPLOYMENT

Following a remand from the superior court, the Public Employees' Retirement Board (PERB) again considered the appeal of Mike McMullen. McMullen argued that because he was a member of the Public Employees' Retirement System (PERS) before July 1, 1977, and the PERS statutes before that date did not specifically exclude leave cash-in payments from the definition of "compensation" used to calculate retirement benefits, his leave cash-in payments during his final three years of employment had to be considered in calculating his benefit. After hearing evidence about the potential multi-million dollar cost to the PERS of a ruling in McMullen's favor (which would open the door for similar claims by thousands of PERS members), and the history of leave cash-ins and the amendments to the PERS statutes, the PERB reversed its earlier decision in McMullen's favor and, by a 2-2 tie vote, upheld the PERS administrator's ruling against McMullen. (The two members who voted in McMullen's favor believed that they were bound by an Alaska Supreme Court decision in which a member of the Teachers' Retirement System had raised a similar issue.) McMullen has appealed to the superior court.

COURT EDITS BALLOT LANGUAGE ON LEGISLATIVE MOVE INITIATIVE

The Alaska Supreme Court issued an order on August 7, 2002, in the case challenging the ballot summary for the legislative session move initiative, which will appear on the November general election ballot. The court found that the last sentence of the state's ballot summary failed to adequately describe the initiative and cast its purpose in an unnecessarily negative light. However, the court determined that the problem with the summary could be remedied with a relatively simple change to the wording of the last sentence, which the court set out in the order. The court's changes to the last sentence of the ballot summary were relatively minor, and the court did not adopt the changes to the ballot language requested by the plaintiffs. The court's decision included a strong dissent by two justices, who agreed with the state's position that the court should have upheld the ballot summary as originally drafted. The plaintiffs in this case have now moved for full, public interest litigant attorney's fees for proceedings in the superior and supreme court.

SUPERIOR COURT RULES IN *ALASKA COMMITTEE OF BLIND VENDORS v. DIANNE'S INC. AND DEPARTMENT OF ADMINISTRATION*

The state and Dianne's, Inc., were granted summary judgment in a case involving a challenge to the state having extended a lease to Dianne's, Inc., a privately owned food establishment, over a 15-year period beyond the term of the current lease and renewal options. The Alaska Committee of Blind Vendors alleged that the lease extension (which was a lease in existence at the time the state purchased the Atwood Building) violated the Chance Act, AS 23.15.132(a). According to the committee, the extension beyond the term of the current lease constituted establishing a food service facility in a state building to other than a licensed blind vendor. The court ruled that Dianne's was already "established" for purposes of AS 23.15.132(a), thus the state did not violate the Chance Act in negotiating an extension to the current lease. The committee has filed an appeal to the supreme court.

FORMER EMPLOYEE'S CLAIMS SETTLED

A former Department of Environmental Conservation employee asserted that the Department of Natural Resources had wrongfully withdrawn a job offer after he accepted it. DNR offered the job before it knew that DEC was investigating some potential procurement problems on projects that the employee had supervised. Once DNR learned of the investigation – but after the employee had accepted the job – DNR withdrew its offer.

The employee hoped that he would still get the DNR job once the investigation was complete, but when DEC finished its investigation, it decided to discipline the employee based on the investigation's results. The employee then filed a grievance over the discipline and asked to be placed in the DNR position. An arbitrator concluded that DEC had not proven that it had just cause for the discipline, but ruled that the employee was not entitled to be placed in the DNR position because he had not filed his grievance on time.

The employee then filed suit in court against the state and three individual defendants. Later, the employee sued his former union and had that suit consolidated with his suit against the state. After several rounds of motions, the only claims remaining for trial were a claim against the state and a claim against his former union. A week before trial was scheduled to begin, the judge directed the parties to attend a settlement conference. Although the employee's expert had estimated that his losses totaled $936,000, the judge recommended at the settlement conference that the case settle in the range of $90,000 to $120,000. After negotiations, we settled the case for $105,000.

Human Services

First and foremost, the Fairbanks Office of the Attorney General is sad to report the recent death of Assistant Attorney General Nora O. King. Ms. King passed away unexpectedly on Sunday morning, August 25, 2002 after a lengthy illness. Ms. King devoted her last 15 years to the Human Services Section prosecuting child in need of aid and juvenile delinquency cases.

ALASKA SUPREME COURT UPHOLDS TERMINATION OF PARENTAL RIGHTS

The Alaska Supreme Court ruled in a memorandum and judgment that the termination of the father's parental rights should be upheld. In *R.P. v. State*, the oldest daughter, who was five at the time, divulged sexual abuse, and identified her father as the perpetrator after her mother and father separated. The children later came into state's

custody, when the mother was neglecting the children. After the state took custody, the state offered the father two sexual offender evaluations, as well as parenting classes, an anger management evaluation, visitation, and other services. The father refused to participate in services to address the sexual offending issues, making reunification with his oldest daughter impossible. The superior court terminated parental rights. The supreme court found that active efforts had been provided, that the father had chosen not to address the issues needed for reunification, and that termination was in the children's best interests as the father failed to address the sexual abuse issues. This case was handled by AAG Alicia Porter.

STATE TAKES CUSTODY OF NEWBORN CHILD DUE TO MOTHER'S DRUG USE

DFYS took custody of a child born with methamphetamines and cannabinoids as tested in the meconium. At the temporary custody hearing testimony was presented by Dr. Doug Lewis of the United States Drug Testing Laboratories, Inc., (in Des Plaines, Illinois). Dr. Lewis was able to refute the mother's assertion that she only used meth one time, three days prior to the birth of the child. The amount of amphetamines in the meconium made that highly unlikely. Dr. Lewis also refuted the mother's assertion as to her amount of marijuana use. What was most interesting was the testimony regarding a recently published study regarding the risks of marijuana use during pregnancy. This study concluded that marijuana use during pregnancy causes "profound changes" in the neurodevelopment of the fetus. Ultimately, at the age of three or four, this adversely affects the decision-making capabilities of the child. In other words, using marijuana during pregnancy is much more dangerous than once believed.

JUVENILE DELINQUENCY PROSECUTIONS

AAG Karen Hawkins retried a 17-year-old who was charged with a sexual assault on a Nordstrom employee who was about to get into her car in the 5th Avenue Mall parking garage. She was knocked to the ground and sexually assaulted. A man and a woman heard the employee screaming and came to her rescue. The man detained the 17-year-old until the police arrived. The jury returned a guilty verdict after deliberating 1½ hours and disposition is scheduled to be held in November 2002.

AAG John Darnall is working with the DA's office on waiving into adult court the juvenile involved in the murder of the young woman who was killed in Anchorage and then driven to Girdwood in a pick-up truck. He and another young man killed her for her $6,000 savings account and her pickup truck. They brought her body to Crow Pass and then set it on fire.

AAG Tracy Hanley is in the process of petitioning to waive a minor to adult status in an attempted murder case in Kenai. He shot at three people in a pick-up truck, his shots just barely missing their heads. Tracy also won her first jury trial involving a car theft.

FOOD STAMP LITIGATION RESOLVED

In June of 2002, two individual plaintiffs in the Bristol Bay region filed a lawsuit in superior court alleging that the food stamp program had improperly imputed fishing income in determining eligibility for food stamp benefits. Bristol Bay Native Association joined in this lawsuit seeking repayment of general relief funds that they expended to help the "plaintiff class" to obtain food in lieu of food stamps.

Upon review of the allegations in the complaint, AAG Stacie Kraly, worked with the Division of Public Assistance to determine if there was a problem in imputing fishing income during the 2002 fishing season. The problem stemmed from eligibility technicians imputing income to fishing households for potential income based

upon draws and advances, when the historical practice of draws and advances from the processors had changed to essentially a practice of "actual payment for actual fish." The state was not aware of this change in the fishing industry, and upon notification of the problem determined that the policy of imputing income in these situations would not in the best interest of the food stamp program.

DPA then negotiated a change in their policy with federal food stamp administration. This was necessary, since the federal government must approve state policy because they fully fund the food stamp program. Upon approval of the policy change, the state agreed to re-determine the eligibility of fishing households in that region and make retroactive payments, if appropriate. In exchange for the policy change and re-determinations, the plaintiffs will be filing a dismissal of their lawsuit. In addition, the state agreed to pay BBNA the costs associated with their general relief expenditures in exchange for the dismissal of their part of the lawsuit. The dismissal should be with the court in Dillingham sometime next week.

Legislation/Regulations

REGULATIONS MANUAL TRAINING PRESENTATION WELL ATTENDED

The legislation and regulations section had a busy month transitioning to the new 2002 edition of the Drafting Manual for Administrative Regulations.

The new edition of the manual can be obtained through the Department of Law's home page at www.law.state.ak.us or by contacting the section at 465-3600. The section gave a videoconference presentation on the manual on August 6. It was attended by over 50 state employees in Anchorage and Juneau.

The section also reviewed and approved for filing several regulations projects, including drinking water program administrative penalties and solid waste management program requirements (DEC); arts grants (Alaska State Council on the Arts); electrical and plumbing code updates (Dept. of Labor and Workforce Development); commercial King Crab fisheries (DF&G); child care assistance (State Board of Education and Early Development); numerous occupational licensing projects (CED); adult public assistance program update (DHSS); and intrastate inter-change telecommunications carriers (RCA).

Natural Resources

DRINKING WATER REGULATIONS ADOPTED

The Natural Resources section in Fairbanks assisted ADEC in promulgating drinking water penalty regulations. These administrative penalty regulations flesh out the 1998 penalty statute that allowed the state to retain primacy over the federal drinking water program. The regulations have an effective date of September 22, 2002.

TRUE NORTH GOLD MINE

The Fairbanks Natural Resources section assisted the DNR in issuing two decisions related to the True North gold mine project. DNR issued its decision on remand on whether the ore haul road provided the greatest economic benefit to the state and the development of its resources. The superior court had remanded for DNR to take into consideration the negative effect on the state of the business losses to the aurora viewing businesses neighboring the haul road. At the same time, the commissioner considered appeals regarding the Division of Mining, Land & Water's determination that an expansion of

the pit at the True North Project was necessary for the extraction and processing of ore. Appeals of both decisions are expected.

APPEAL BRIEF FILED IN CFEC CASE

In August, we filed an appeal brief in *Kuzmin v. State*, *Commercial Fisheries Entry Commission*. The CFEC denied Mr. Kuzmin's application for a limited entry permit for the Prince William Sound salmon drift gillnet fishery. Mr. Kuzmin appealed. One of his main arguments is that he should have been deemed a constructive gear licensee at the relevant time even though the license he claims was actually held by his brother. The state has argued that the controlling law recognizes only actual licensees. The appeal is currently pending before the superior court.

Oil, Gas & Mining

Department of Natural Resources and Cook Inlet Region, Inc. have agreed to resolve all royalty and net profit share disputes regarding CIRI's oil production from its Duck Island Unit (DIU) lease from the first date of production through January 31, 1998. CIRI has paid the state $160,000 to resolve the disputes. This is CIRI's final liability for DIU royalties and net profit share, since it sold its interest in the DIU lease to BP in 1998. CIRI has also agreed to negotiate a memorandum of understanding under which CIRI consents to DNR's assumption of audit functions, under a delegation from the Minerals Management Service, pertaining to federal oil and gas leases in Alaska in which CIRI has interests. AAG Virginia Ragle assisted DNR in this matter.

Special Litigation

CHALLENGE TO DISTRICT COURT'S JURISDICTION FAILS

AAG Randy Olsen was successful in opposing a petition for review filed by Erika Faulk challenging the constitutionality of the district court's jurisdiction. The challenge went to the amount in controversy and the limitation of district court trials to jurors of six persons. The Alaska Supreme Court denied the petition.

NINTH CIRCUIT AFFIRMS DISMISSAL OF DENARDO SUIT

In *DeNardo vs. MOA and Cynthia Fellows, et al*, the Ninth Circuit affirmed the U. S. District Court for the District of Alaska's dismissal of Mr. DeNardo's Section 1983 claims against State Court Law Librarian Cynthia Fellows. The lawsuit arose from DeNardo's arrest, after hours, in the law library. DeNardo claimed that Ms. Fellows conspired with MOA prosecutors to deny DeNardo's "constitutional right" of access to the law library. The district court granted Ms. Fellows' motion for summary judgment based upon Mr. DeNardo having failed to bring the lawsuit within the prescribed time for Section 1983 claims. Ms. Fellows was represented by AAG Gary Guarino in both the U.S. District Court and Ninth Court proceedings.

COURT FINDS OCCUPATIONAL DISABILITY BENEFITS DO NOT OFFSET LOST EARNINGS IN FERRY WORKER INJURY CASE

Unlike other state employees covered by workers' compensation, state ferry workers may bring a lawsuit against their employer under the Jones Act or unseaworthiness theories for work-related injuries. Frequently a major component of damages in maritime personal injury cases is future loss of income. In a recent superior court case, the question arose

whether occupational disability benefits paid to an injured seaman should offset a claim of lost future wages. Like other employees in the Public Employees Retirement System, ferry workers may receive occupational disability benefits for a work-related injury (40% of past wages until normal retirement age). AAG Tom Slagle argued that the state should get a partial credit for these benefits against the employee's wage loss claim; otherwise the employee could recover 140% of his loss of income.

In ruling against the state, superior court Judge Patricia Collins opined that PERS occupational disability benefits are fringe benefits bargained for by the IBU. In addition, although employees do not directly pay for occupational disability benefits, the court found that they were at least partially funded by the employee (through interest the state makes on invested retirement contributions). In addition there is not a specific off-set provision in statute or in the union contract. Consequently, the court ruled that the state is not entitled to an offset for PERS occupational disability benefits in a ferry worker's personal injury case.

Transportation

ALASKA SUPREME COURT HOLDS FOR STATE IN INVERSE CONDEMNATION CASE, *JACKOVICH v. STATE*

Four plaintiff property owners along Illinois Street in downtown Fairbanks, sued the Department of Transportation and Public Facilities, asserting an inverse condemnation action based on the alleged diminution in the fair market value of their respective commercial properties. The property owners claimed the loss of value was caused by the state's announcements that a project might be constructed, and the state's subsequent delay in failing to construct such a project. The Alaska Supreme Court affirmed Judge Pengilly's ruling on summary judgment that the evidence in this case could not support an inverse condemnation action under Alaska law. The landowners presented only evidence of the state's typical (and for the most part, federally required) planning and public involvement activities related to a possible future Illinois Street project. The landowners claimed that those facts alone constituted a de facto taking of their parcels of property.

The court held that, in order to establish an inverse condemnation claim based on pre-condemnation publicity or planning activities, a landowner must demonstrate that the condemning authority publicly (a) announced a present concrete intention to condemn a specific property or properties, and (b) did something that substantially interferes with the landowners' use and enjoyment of their property.

The court also affirmed the inapplicability of the rule in *Ehrlander v. State*, whereby a landowner is sometimes allowed to advance the date of taking for purposes of property valuation. In the instant case, since there had been no formal taking, *i.e.,* no eminent domain action had been filed, nor had there been an inverse condemnation, there was no date of taking to advance.

This case was handled by AAG Mason Damrau.

ARTIC VILLAGE FAA/STATE MATCHING GRANT

AAG Paul Lyle first reported on this matter in April 2002. The case concerns an airport construction project directly funded by FAA to the tribe. The specifications for the project required the prime contractor to sign a project labor agreement that included an “initial hire list” to be provided by the village council to the prime contractor. People on the initial hire list were to be given a hiring preference on the project.

This office determined that the hiring preference violated federal law and the Equal Protection Clause of the Alaska Constitution. DOT had provided $115,000 in matching funds for the project. We successfully negotiated amendments to the grant agreement that addressed the legal problems.

This month, the final grant agreements including the negotiated amendments were signed. In addition, we added language to the grant that precisely defined the duration of the tribe's waiver of sovereign immunity (six years following the expiration of the three-year period the tribe is required to retain project records under its grant with the FAA.)

ALLOWABLE USES OF THE KLUTINA LAKE ROAD RIGHT-OF-WAY UNDER R.S. 2477

This month we issued a memorandum of advice concerning the allowable uses of the R.S. 2477 right-of-way for the Klutina Lake Road. Our advice concludes that "DOT&PF may make improvements to the road reasonably necessary to accommodate the uses made of the road from its establishment circa 1898 through October 21, 1976 (the date R.S. 2477 was repealed) and may take reasonable steps to render the road convenient for those public uses." Specifically, DOT&PF may reasonably improve the road to accommodate two-way travel, and to construct turnouts for rest stops and overnight camping, and to otherwise reasonably accommodate historic uses made of the road. We also conclude that:

The adjacent landowner may not interfere with or regulate historic public uses of the road.

An overlapping ANCSA § 17(b) easement for the road reserved in the patent to the adjacent landowner does not supplant the R.S. 2477 right-of-way, which is of greater scope than the § 17(b) easement.

ALLOTMENT DISPUTE RESOLVED

On the eve of an administrative hearing before an administrative law judge of the Office of Hearings and Appeals, Department of the Interior, the state reached a settlement in *United States v. Louie A. John v. State of Alaska*, IBLA 94-416R. At issue was a DOT/PF material site on the Steese Highway. Louie A. John claimed the material site was invalid due to his independent use and occupancy of the land for a Native allotment when he was nine years old. The state asserted that his use and occupancy was not independent at age nine, and in any event, because the land was appropriated by the BLM to Alaska pursuant to 23 U.S.C § 317, the land was not subject to being allotted under any circumstances. Louie A. John ultimately decided it was too risky for him to proceed to a hearing. He agreed to relinquish his claim to the material site, and agreed that his allotment would exclude the material site (rather than being made subject to it). Since the material site is only 3.44 acres in size, Mr. John will still receive almost 98% of his allotment claim.

Criminal Division

ANCHORAGE

Marshall Ahvakana was charged with murder in the first and second degree, sexual assault in the first degree, sexual abuse of a minor in the second degree, and tampering with physical evidence, for the murder of a 15-year-old girl in her grandparents' trailer. Bail was set at $500,000.

Peter Andrews has been charged with first degree murder and conspiracy, as well as various other charges for murdering his roommate for her small bank account and her truck. Another man is charged with tampering with evidence and hindering prosecution. A 14-year-old juvenile who helped with the murder

has been charged in juvenile court, and the state will seek waiver to adult jurisdiction. Bail for Andrews was set at $250,000.

On August 15, 2002, a grand jury indicted Brandon Ling, a 16-year-old, of murder in the first and second degree for the stabbing death of a 13-year-old girl. Bail was set at $500,000.00.

BARROW

Various charges against several defendants were presented to the grand jury in August. One was indicted for attempted murder in the first degree, three counts of assault in the third degree, and criminal mischief in the third degree. One was indicted for burglary in the first degree and criminal mischief in the second degree. Two were indicted for misconduct involving controlled substances in the fourth degree. One was indicted for felony eluding; one for evidence tampering; and one for vehicle theft.

BETHEL

Charles Peters, Sr., was convicted of assault in the first degree (DV) and assault in the third degree, after a jury trial, for hitting a person with a pool cue and then later stabbing his adult son.

Ray Langlois was found guilty of assault in the fourth degree (DV) after a jury trial.

James Nicholas was found not guilty of assault in the fourth degree and violating conditions of release after a jury trial. Nalon Evan was found not guilty of sale of liquor without a license after a jury trail.

Five men were indicted for sexual abuse of a minor, and three more for sexual assault. Seven were indicted for felony assault; five for theft or burglary; three for importation; and one each for arson, robbery, and felony DUI.

Mary Pieper came from the Kenai office to assist for five days in August, and Devinder Brar left the office to return to Calgary. Her last day was August 20th. Devinder may be returning on a temporary basis in October for three months.

DILLINGHAM

John Knutsen put a small video camera in the women's dressing room of the local swimming pool in Naknek. Police received a call from another pool employee and went to get the camera. The video camera was located above a feminine hygiene dispenser and was hooked up to a TV/VCR combo located in an electrical/storage system room nearby. A jury convicted Knutsen on all eight counts of indecent viewing (of which two were misdemeanors). Sentencing is set for November.

FAIRBANKS

The Fairbanks office welcomed a new attorney, Jason Gazewood, and said goodbye to attorney Sara Gehrig, who is returning to her home state of Wisconsin.

This month was marked by ongoing problems with the grand jury recording system, including the complete failure to record two cases on a single day. The court system moved grand jury proceedings into the Supreme Court room for two weeks while they replaced equipment, which gave our grand jurors a chance to compare their inadequate facilities to those made available to trial juries.

Theodore Jenkins was indicted during two separate presentations for over 40 counts of sexual abuse of minors, indecent viewing and photography, possession and distribution of child pornography. The defendant lived in the same household as his nephew, and when the boy had friends stay overnight, Jenkins photographed and molested them as they slept. Fortunately, he also photographed his own hands, which contained distinctive scars and

moles. The defendant had five computers in his home, and State Trooper investigators have determined that there are over 800,000 pornographic images stored on them or downloaded to discs.

Convicted felon Timothy Lobdell pled out to charges of attempted murder of a state trooper and weapons misconduct for an episode in which he was shot while fleeing the trooper. He went into the woods and down an embankment, where he remained in sub-zero temperatures for over half an hour before he could be located, losing some toes to frostbite in addition to other injuries.

KENAI

Six members of the Scooter Tramps, a local biker gang associated with the Hell's Angels, were charged in a 27-count indictment covering 46 counts of various degrees of assault, weapons possession, burglary, robbery, and several acts of witness intimidation and interference with investigation or prosecution, including coercion, tampering with physical evidence, tampering with witness, interference with official proceedings, and hindering prosecution. The charges relate to a series of attacks against a former member of the gang who tried to leave the group rather than participate in other illegal activities.

In one of the more interesting recent trials in Kenai, Steven Bachmeier was convicted of two counts of domestic violence assault and one count of reckless endangerment. The convictions resulted from an argument with his girlfriend in which he threw a cup of coffee at her. The cup missed her and shattered on the kitchen floor, splashing coffee on her and her infant child, who was sitting on the kitchen floor, and sending sharp shards of broken coffee cup all over the kitchen. The infant was splashed by the coffee but was not hit by the sharp fragments of the cup. The girlfriend picked up the crying infant and ordered Bachmeier out of the house. On his way out of the house, Bachmeier punched his girlfriend in the face. The follow-through of the punch also hit the infant who was in the arms of her mother, causing a bloody nose.

While the facts themselves were fairly typical for a DV case, the trial was particularly interesting because all evidence was presented without either of the victims, or the defendant. The defendant showed up on the morning of trial knowing that the state had not been able to subpoena the victim and expecting the state not to be able to prove the case. The state informed the judge that we would be proceeding based on the 911 tape and the victim's statements to the officer. When the defense objected, the court held a brief hearing and determined that both the 911 tape and the police contact tape with the victim were admissible as excited utterances. The trial continued with jury selection. The next morning, the defendant failed to appear and defense counsel had no information as to his whereabouts. After a brief recess the state provided information that neither the local hospital, jail, nor any law enforcement agencies had had contact with the defendant since he was last in court and requested that the trial continue in his absence. The court continued the trial for one day to determine if there was any emergency reason for the defendant not being present. When the defendant failed to appear the next morning, trial continued and the defendant was convicted of all counts.

Louis Sanders was convicted of DUI and FTA following a jury trial in Homer.

A recent felony DUI saw the impounding of a silver 1985 Pontiac Grand Am. The car had recently been sold to the defendant for one dollar, and he probably overpaid.

A Kenai man was indicted by the grand jury for two counts of assault in the third degree. After leaving a party, the man drove a vehicle at estimated speeds of 70 miles an hour and attempted to make a turn onto the Kenai Spur Highway. He was unable to stop, and he hit

the rear axle of a tractor trailer loaded with hot oil.

KETCHIKAN

August was a typical month for the grand jury, which returned indictments for felony assault, theft, forgery, multiple felony DUIs, vehicle theft, burglary, drugs, SAM, hindering prosecution, perjury, criminal mischief, and riot (yes, riot).

We only had one trial, for misdemeanor DUI. The defendant provided a breath sample on the Datamaster of .162 but the jury acquitted. Asked about the acquittal, several said they just didn't trust the Datamaster. They also said, having seen the DUI processing video, that "he just didn't look drunk to me." One mentioned they were concerned that the breath test result was inaccurate because the defendant was on some sort of heart medication.

KODIAK

An 18-year-old Kodiak woman has been indicted for misconduct involving a controlled substance in the third degree, for sale of a bindle of crystal meth to an informant working with the Kodiak Police Department. In one related case, a 25-year-old Kodiak man was indicted for misconduct involving a controlled substance in the first degree, alleging that he distributed crystal meth to a person under the age of 19 years of age - namely the runner he used to deliver his drugs for him. He was also indicted for three other drug felonies and another felony for possessing a weapon during the commission of a drug offense. In yet another related case, the male defendant's 20-year-old girlfriend was indicted as his accomplice. A December trial date has been set for all three cases.

A 42-year-old Kodiak man already on probation for a felony DUI committed a second felony DUI when he was observed to be driving very erratically and was stopped by a road construction flagman who took away his license and then contacted the State Troopers. When contacted by Troopers at his home a short time later, the man provided a sample of his breath which determined him to be intoxicated over twice the legal limit for alcohol intoxication. A trial date has yet to be set.

A 24-year-old Kodiak man was indicted for felony eluding after running from police and driving his four-wheeler at speeds exceeding 80 mph. A November trial date has been set.

A 36-year-old commercial fisherman was indicted for misconduct involving weapons in the first degree after a case of “open seas road rage”. Upon coming upon another fishing vessel with whom the fisherman had a dispute, the man proceeded to run over the net of the second vessel six or seven times in a row. When the other fisherman complained about his conduct over the VHF radio, the defendant fired the contents of his .44 Magnum handgun toward the other vessel, all the while explaining over the Coast Guard - monitored and recorded - VHF channel 16 that the next round was going to go into the other fisherman's head.

KOTZEBUE

A man was arrested after a series of incidents in Kotzebue. Shortly after he had been kicked out of a residence in Kotzebue, the owner discovered that his arctic entry was on fire. A short time later, the intoxicated man stole his brother-in-law’s pickup, then crashed into some large boulders next to the museum. He is charged with arson, burglary, vehicle theft, and DUI.

A man from Kivalina was charged with sexual assault after his sister revealed that he had been sexually abusing her for years.

Elwood Koenig was convicted of assault in the third degree in a case in which he strangled his girlfriend to the point of unconsciousness. He is scheduled for sentencing February 2003.

The ever-litigious William Howarth has filed yet another post-conviction relief application. Howarth was convicted of a sexual assault in 1981. He successfully litigated a PCR claim in 1986, but later pled to a reduced charge of sexual assault in the second degree. After serving that sentence, Howarth was convicted of murdering a woman in Kotzebue in 1995. He has pursued numerous appeals and post-conviction motions in the murder case. His most recent effort, however, is to reopen the 1981 sexual assault case - at least this one is easy to respond to.

NOME

Jacob Anagick came to the Nome police department and told one of the officers that he had killed a man with an axe the previous day. The police briefly interviewed the suspect, then went to the home of the victim where they found him dead, apparently having been struck in the head with an axe several times. Later, Anagick gave a more complete account of the homicide and claimed only he and the victim had been present. In the meantime, the police received several reports that an intoxicated female had been claiming responsibility for an axe murder. The police picked up Bernice Slwooko and interviewed her. Her story was that Anagick and the victim had become involved in a minor altercation. To assist Anagick, she had picked up the axe and struck the victim in the head. She stated that Anagick then took the axe and finished off the unconscious, but apparently still breathing, victim. As the facts developed, Anagick was trying to cover up his girlfriend's involvement. Both were indicted for first-degree murder.

Continuing that theme, the victim of a domestic assault/stabbing (who lost a kidney as a result of the incident) claimed, when the police first arrived at the scene, that he had not been stabbed by his girlfriend but had fallen on a knife while cutting a pizza. Also indicted was a man charged with multiple counts of felony assault for terrorizing the village of Elim with several firearms.

PALMER

Stephen Mason was convicted by a jury of three counts of sexual abuse of a minor in the first degree, three counts of sexual abuse of a minor in the second degree, and one count of incest. Defendant admitted to sexual contact both in a Glass warrant and an interview with the Alaska State Troopers. However, he maintained that though he had abused his daughter since she was 7 years old (she was 15 when she disclosed the abuse), he never penetrated her. It only took the jury 23 minutes to convict him. Sentencing is set for December.

SITKA

There were two trials during August. The first trial was a felony DUI, handled by Juneau ADA Doug Gardner, which resulted in a hung jury. The defendant claimed that he was not driving the car, yet he was the only person by the vehicle when the police arrived and he made statements which indicated that he was the one driving.

The second trial was a misdemeanor DV assault, handled by ADA Natasha Norris. The victim in the case had been hesitant about testifying, but was willing until the second morning of trial, when she was called as the state's first witness. She refused to testify regarding anything. The victim pled the Fifth and after a McConkey hearing, the judge would not allow questions to the victim regarding the incident. During cross-examination, the case officer, the state's only other witness, characterized the case as "not very serious." The jury acquitted the defendant. Tough trial week for the Sitka DA's office.

During the month of August two major incidents occurred at the Sitka Seafood Producers Cooperative. The first involved a burglary and theft of anhydrous ammonia, a chemical used in drug manufacturing. Search warrants for the suspects' boat and trailer led to indictments in

September. More to come on this case. The second incident involved a major break in one of the world's largest salmon theft cases. A record-sized King salmon was stolen from the cooperative in July and an anonymous tip in August led the police to the suspects who had committed the heist. More to come on this exciting case as well.

In Petersburg, William L. Smith was convicted of sexual assault in the second degree, assault in the third degree and assault in the fourth degree, with a composite sentence of six years with three years suspended.

OSPA
(Office of Special Prosecutions & Appeals)

Prosecution News

Mark Edwards was convicted by a jury of two counts of first-degree murder. The case has spanned years and a number of prosecutors because of ongoing hearings about Edwards' competency to stand trial. In December 1998, Edwards returned to his ex-wife's house after he learned that she had obtained a restraining order against him. He entered the house and shot his ex-wife and her friend; he then attempted to commit suicide by shooting himself in the head. He was not successful. Sentencing is set for November 11.

Tor Hofseth pled no contest to one count of insurance fraud. Hofseth reported that his Delorean automobile had been stolen when it was really hidden on the back of his lot. Unfortunately for Hofseth, a trooper who knew about the case flew over his property in a helicopter on his way to Prince William Sound and he saw the unique automobile on the lot. Sentencing is set for October.

August was a good month for the Welfare Fraud unit. Freda Williams, Laurie Ginnis, Fabian Medina, and Victoria Jones were each convicted of second-degree theft for under-reporting their incomes and receiving extra benefits. Approximately $13,800 of restitution was ordered to be paid back to the state, and each defendant was ordered to perform community work service.

Petitions & Briefs of Interest

Briefs of Interest

Juror misconduct before deliberations. The state argues that Alaska Evidence Rule 606(b) bars juror affidavits describing alleged misconduct in the jury room and courtroom during the course of trial (before the jury retired to deliberate). The state also argues that the court should follow *United States v. Tanner*, 483 U.S. 107, 107 S. Ct. 2739, 97 L.Ed.2d 90 (1987), which holds that the comparable federal evidence rule applies to pre-deliberation allegations of misconduct. Last, the state argues that a juror's failure or refusal to follow court instructions and a juror's reliance on the defendant's failure to take the stand or the absence of his wife from the courtroom are internal matters on which a juror cannot testify. *Larson v. State*, A-8028.

Escape - not guilty by reason of insanity. The state argues that a defendant who committed first-degree murder and was found not guilty by reason of insanity (NGBI) can be convicted of escape after he ran away while on a field trip from Alaska Psychiatric Institute. The state makes this argument in response to the defendant's claim that a person committed to a mental institution under a judgment of NGBI is not in "official detention for a felony" for purposes of the escape statute. *Alto v. State*, A-7961.

Search incident to arrest; "plain-feel" search. The state argues that a defendant subjected to an investigative stop who tells the officer that he has marijuana in his pocket is subject to arrest for possession of marijuana

and to a search incident to arrest. The state also argues, alternatively, that the officer is authorized to search inside the defendant's pant pocket when, as a result of a weapons frisk, he can feel objects that he immediately recognizes as bindles of crack cocaine. *McGuire v. State*, A-8216.

Use of deadly force in defense of property. The state argues that the defendant was not entitled to a jury instruction concerning the use of deadly force to defend his taxi cab. The state argues that before a defendant is entitled to that defense-of-property instruction, he must show some evidence that (1) he was in possession or control of a building, (2) he had a reasonable belief that deadly force was needed to terminate the burglary of that building, (3) that a burglary was occurring in the building, and (4) that the building was occupied when he acted. Although conceding that a taxi cab could be considered a building, the state asserts that the instruction was not warranted since the defendant was outside of the taxi cab when he assaulted the victim. *Delloli v. State*, A-8263.

Opinions of Interest

Attempted first-degree robbery. The Alaska Court of Appeals examined the first-degree robbery statute and its accompanying commentary and held that there is such a thing as attempted first-degree robbery in Alaska. The first-degree robbery statute includes attempted takings; the court of appeals held that a person could be guilty of attempted first-degree robbery for conduct that occurs before there is an attempted taking. *Beatty v. State*, Op. No. 1816 (Alaska App., August 9, 2002).

Presentence reports and juvenile delinquency history. The court of appeals interpreted Alaska Criminal Rule 32.1(b)(1), AS 47.12.300(d), and Delinquency Rule 27(a)(1) before concluding that a presentence investigator may use the information found in a defendant's juvenile court files – including the juvenile probation officer's files – without first obtaining a court order to do so. The information that may be included is not limited to formal findings of delinquency. *McCoy v. State*, Op. No. 1822 (Alaska App., August 30, 2002).

Appellate Rule 214(d) and citation of unpublished memorandum opinions. The Alaska Court of Appeals held that Appellate Rule 214(d), which states that unpublished memorandum opinions may not be cited in the courts of Alaska, does not preclude citing memorandum decisions for informational purposes in the trial courts. The state has petitioned for rehearing from this holding. *McCoy v. State*, Op. No. 1822 (Alaska App., August 30, 2002).

Force includes indirect contacts. The Alaska Court of Appeals interpreted AS 11.81.900(b)(26), which defines "force" as including any "bodily impact," to include indirect contacts. That is, force is used where the defendant does not touch the victim, but contacts only property (such as a purse) held by the victim. *Butts v. State*, Op. No. 1821 (Alaska App., August 23, 2002).